Supreme Court, U.S.
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In The
Supreme Court of the United States

JAMES OBERGEFELL, et al.,
Petitioners,

v.

RICHARD HODGES, Director,
Ohio Department of Health, et al.,
Respondents.

VALERIA TANCO, et al.,
Petitioners,

v.

BILL HASLAM, Governor of Tennessee, et al.,
Respondents.

APRIL DEBOER, et al.,
Petitioners,

v.

RICK SNYDER, Governor of Michigan, et al.,
Respondents.

GREGORY BOURKE, et al.,
Petitioners,

v.

STEVE BESHEAR, Governor of Kentucky, et al.,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE LARY S. LARSON IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus, Lary S. Larson, is a practicing lawyer and an active participant in local and state politics. His interest in filing this brief stems from a compelling desire to contribute something helpful to this important national debate. As a former ordained minister and a past candidate for the Idaho Legislature, he took a sincere interest in the issue of same-sex marriage and wrote extensively on that subject. He continues to believe that his insights on this issue will be helpful to the Court.

SUMMARY OF THE ARGUMENT

There are five states that are not parties to this case but that have a unique interest in its outcome. They are states that, prior to *United States v. Windsor*, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), adopted civil union or domestic partnership statutes giving same-sex couples "everything but marriage," but denying them its special reputational value. After *Windsor* their same-sex marriage prohibitions were declared unconstitutional.

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[1] By a letter on file with the Clerk, all Petitioners have jointly consented to the filing of this Brief. All Respondents filed a blanket consent to the filing of all amicus briefs. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part; no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief; and no other person other than Amicus and his counsel made any such monetary contribution.

The reputational value of marriage is a personal interest separate and distinct from all other legal incidents of marriage. It means having the State approve and condone a couple's sexual relationship and lifestyle. When the reputational value of marriage is correctly understood in that manner, it proves not to be a fundamental right. Rather, States with "everything but marriage" laws may deny same-sex couples the right to marry if that policy promotes a legitimate state interest.

The promotion of moral values in society is a legitimate State interest, and the traditional institution of marriage has been a powerful force in that effort. But it is reasonable to believe that allowing same-sex couples to marry would lessen the effectiveness of marriage as a means of promoting moral values.

Therefore, if a State adopts an "everything but marriage" law that gives same-sex couples all other benefits of marriage, the Fourteenth Amendment does not require the State to allow such couples to marry.

ARGUMENT

I. Introduction.

As of February 19, 2015, same-sex marriage had been legalized in 37 states – in 26 by judicial decree,

in 8 by legislative action, and in 3 by popular vote.[2] Same-sex marriage prohibitions (either by statute or by constitution) were still in place in 13 states, although in 7 of those the laws banning same-sex marriage had been struck down by judicial decisions that are still under appeal.[3]

While the national debate over this issue has usually treated same-sex marriage as an "all-or-nothing" proposition, 15 states took a different approach. They chose to recognize legally the committed relationships of same-sex couples by adopting civil union or domestic partnership laws that formally legitimize same-sex relationships without calling them "married."[4]

In ten of those states, the domestic partnership or civil union laws actually gave same-sex couples the identical legal and economic benefits afforded to married couples.[5] Those laws were euphemistically called "everything but marriage" laws.

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[2] ProCon.org, 233 Wilshire Blvd., Suite 200, Santa Monica, CA. Online at http://gaymarriage.procon.org/view.resource.php?resourceID=004857.

[3] *Ibid.*

[4] Colorado, Hawaii, Illinois, New Jersey, California, Maine, Nevada, Oregon, Washington, Wisconsin, Connecticut, Delaware, New Hampshire, Rhode Island, and Vermont.

[5] Colorado, New Jersey, California, Nevada, Oregon, Hawaii, Washington, Delaware, New Hampshire, and Rhode Island. National Conference of State Legislatures, 7700 East First Place, Denver, CO 80230, Online at http://www.ncsl.org/

(Continued on following page)

Under an "everything but marriage" regime, although same-sex couples enjoy all the same tangible advantages that married couples enjoy, they lack the unique societal veneration (i.e., the "reputational value") that the status of traditional marriage confers. Whether such couples in an "everything but marriage" state have a constitutional right to enjoy that reputational value is the narrow focus of this amicus brief.

In all 15 states that passed civil union or domestic partnership statutes, same-sex marriage has subsequently been legalized either by statute or by court ruling.[6] Of the 10 that had "everything but marriage" statutes, same-sex marriage was legalized by judicial decree in 5 of them: Colorado, New Jersey, California, Nevada, and Oregon (where almost 19% of the national population resides). Those decisions all became final between June 28, 2013, and October, 2014, following the Supreme Court's decision in *United States v. Windsor*, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013).

Although none of the states whose laws are at issue in this case are or were "everything but marriage" states, the decision in this case, like the decision in *Windsor*, will most likely be seen as settling the question whether the Fourteenth Amendment

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research/human-services/civil-unions-and-domestic-partnership-statutes.aspx.

[6] National Conference of State Legislatures, 7700 East First Place, Denver, CO 80230. *Ibid*.

allows a state to enact an "everything but marriage" law but still prohibit same-sex marriage, per se. Affirming the Court of Appeals' decision would answer that question in the affirmative. Reversing it entirely would no doubt be interpreted as precluding that opportunity.

That is meaningful to the five above-mentioned states where "everything but marriage" laws were democratically adopted but judicially revoked. With an appropriate outcome in this case, those states, as well as many others, would have a renewed opportunity to democratically enact "everything but marriage" laws for the benefit of same-sex couples, while at the same time preserving the traditional definition of "marriage" for as long as they believe that doing so promotes the public welfare. The key is to resolve the current controversy in a way that comports with the Constitution and leaves that door open.

To that end, we submit the following partial answers to the questions posed by the Court in this case:

(1) If a state's laws allow a same-sex couple to enter into a legal union by which they enjoy the same legal and economic rights that married couples enjoy, then the Fourteenth Amendment does *not* require that state to issue them a marriage license.

(2) If a state's laws allow a same-sex couple lawfully married in another state to enjoy the same legal and economic rights

> that other married couples enjoy, then the Fourteenth Amendment does *not* require that state to recognize them as married.

We limit our argument to those narrow propositions, recognizing that there will be many other parties who thoroughly and expertly cover the broader issues raised by this case.

II. In States with "Everything but Marriage" Laws, the Issue is Whether the States May Deny Same-Sex Couples the Reputational Value of Marriage.

A. There are Constitutionally Significant Differences Between the Legal Incidents of Marriage and its Reputational Value.

In the same-sex marriage debate, how the question is presented can make all the difference. For example, "Shall marriage continue to be defined as a committed union between one man and one woman, or shall it henceforth include same-sex couples?" The query itself implies that the right to marry is an indivisible, all-or-nothing concept.

In truth, "the" right to marry is a combination of many related but separable rights, privileges, and benefits. States with civil union or domestic partnership laws, and some courts, have drawn a line between the legal and economic privileges of married

couples on one hand, and the intangible, reputational value of marriage on the other.

Many of the legal and economic advantages incidental to marriage have been created for the purpose of encouraging the formation of strong families. They include special treatment for married couples in connection with adoptions, entitlement programs, evidentiary privileges, guardianships, insurance programs, probate proceedings, property rights, retirement programs and taxes, to name only a few.

But the legal and economic incidents of marriage can easily be conferred on unmarried couples as well for the same purpose – to support long-term, committed, loving relationships. When a State permits unmarried couples to solemnize their mutual long-term commitments in ways other than marriage, it has essentially bifurcated the right of marriage, separating its practical incidents from its reputational value. It has separated the "rights *of* marriage" from the "right *to* marry."

For example, in California, Proposition 8 sought to accomplish that bifurcation by amending the state constitution:

> "Proposition 8 worked a singular and limited change to the California Constitution: it stripped same-sex couples of the right to have their committed relationships recognized by the State with the designation of 'marriage,' which the state constitution had previously guaranteed them, while leaving in

> place all of their other rights and responsibilities as partners – rights and responsibilities that are identical to those of married spouses and form an integral part of the marriage relationship. * * *
>
> "The official, cherished status of 'marriage' is distinct from the incidents of marriage, such as those listed in the California Family Code."

Perry v. Brown, 671 F.3d 1052, 1076, 1078 (9th Cir. 2012), *vacated on jurisdictional grounds*, *Hollingsworth v. Perry*, 570 U.S. ___, 133 S.Ct. 2652 (2013).

The traditional institution of marriage carries a universally understood symbolism that has little to do with its legal and economic incidents. Granting a marriage license to a couple bestows an honor on them. It recognizes that they are eligible to establish a home and a family, and to bring children into it. It assures them that they may engage in sexual relations without the moral opprobrium that social norms attach to extra-marital sex. It communicates to them society's approval of their relationship and their conduct. It condones their lifestyle as appropriate and consistent with good morals.

Without the designation of "marriage," all the other legal and economic incidents of marriage do not carry the same reputational value. "The incidents of marriage, standing alone, do not, however, convey the same governmental and societal recognition as does the designation of 'marriage' itself." *Id.*, at 1078-1079.

The powerful symbolism in traditional marriage has been one of the primary incentives for same-sex marriage litigation. In *Perry v. Brown, supra,* the Ninth Circuit Court of Appeals observed that, "'marriage' signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships." *Id.*, at 1078. "It is the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it." *Id.*, at 1079. "[W]e emphasize the extraordinary significance of the official designation of 'marriage'. That designation is important because 'marriage' is the name that society gives to the relationship that matters most between two adults." *Id.*, at 1078. The designation "married" symbolizes "state legitimization and societal recognition of their committed relationships." *Id.*, at 1063.

Domestic partnerships and civil unions by comparison do not satisfy "all of the personal and dignity interests that have traditionally informed the right to marry. . . ." *Id.*, at 1066. "'[P]roviding only a novel, alternative institution for same-sex couples' constituted 'an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples.'" *Id.*, at 1067 (quoting *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008)). "[D]omestic partnerships lack the social meaning associated with marriage." *Id.*, at 1075 (quoting the lower court). Domestic partnership "stigmatizes same-sex couples as having relationships inferior to those of opposite sex

couples" (*Id.*, n.4). "[T]here is a significant symbolic disparity between domestic partnership and marriage. It is the designation of 'marriage' itself that expresses validation, by the state and the community, and that serves as a symbol, like a wedding ceremony or a wedding ring, of something profoundly important." *Id.*, at 1078.

A same-sex couple's interest in the reputational value of marriage is therefore of a much different nature and of a much different degree of importance than their interest in the legal and economic incidents of marriage. The same is true from the perspective of the state, although for different reasons. Those significant differences in nature, importance, and perspective mean that the Fourteenth Amendment must have a different impact on a state's power to deny same-sex couples the status of marriage than it has on the state's power to deny them the legal and economic privileges of marriage. Courts that have overturned same-sex marriage bans without considering the meaningful differences between those two separate aspects of the right to marry have "thrown out the baby with the bathwater."

B. A Bifurcated Approach to Marriage Rights is Evident in the Development of Marriage Jurisprudence over the Last Four Decades.

In the U.S. Supreme Court's initial foray into this subject, *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34

L.Ed.2d 65 (1972), the Court left standing a Minnesota Supreme Court decision that upheld a state statute defining "marriage" as a union between persons of the opposite sex. The appellants' only contention was that the rejection of their application for a marriage license patently denied them a fundamental right, deprived them of property or liberty without due process, and denied them equal protection. *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971). There was no contention in *Baker* that the prohibition against same-sex marriage deprived same-sex couples of any legal or economic benefits that were enjoyed by opposite-sex couples.

The Supreme Court's decision that that case presented no substantial federal question can therefore be read as confirmation that, at least when the legal and economic benefits of marriage are not at issue, the state is free to determine whether or not the reputational value of marriage will be bestowed on same-sex couples. It appears to accommodate a bifurcated approach to analyzing those two separate aspects of the right to marry.

A good early example of a state court applying a bifurcated approach to marriage rights is *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196 (2006). In that case, the New Jersey Supreme Court held the state's ban on same-sex marriage to be unconstitutional (under the New Jersey state constitution) insofar as it denied the legal and economic incidents of marriage to same-sex couples. However, the Court did not reject the state's right to deny the status of marriage to

same-sex couples. Rather than ordering county clerks to begin issuing marriage licenses to same-sex couples, the court gave the legislature 180 days to adopt a civil union statute giving same-sex couples the identical legal and economic benefits as married couples. On the failure of the State to do so, the same-sex marriage ban would be stricken *in toto*. Thus, the Court recognized that the state had the power to deny same-sex couples the reputational value of marriage, but not the legal and economic benefits of marriage. The Court explained:

> "The legal battle in this case has been waged over one overarching issue – the right to marry. A civil marriage license entitles those wedded to a vast array of economic and social benefits and privileges – the rights of marriage. Plaintiffs have pursued the singular goal of obtaining the right to marry, knowing that, if successful, the rights of marriage automatically follow. We do not have to take that all-or-nothing approach. We perceive plaintiffs' equal protection claim to have two components: whether committed same-sex couples have a constitutional right to the benefits and privileges afforded to married heterosexual couples, and, if so, whether they have the constitutional right to have their 'permanent committed relationship' recognized by the name of marriage."

188 N.J. 415, 433.

The Court concluded that equal protection under the New Jersey constitution required that same-sex

couples be given the opportunity to enjoy all of the legal and economic incidents of marriage, but not necessarily the status of marriage.

The bifurcated perspective of marriage is also evident in *Massachusetts v. U.S. Dept. of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012). There, the First Circuit Court of Appeals considered whether Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. §7, violated either the Equal Protection Clause of the Fourteenth Amendment or the federalism principles of the Tenth Amendment.

The Court relied on *Baker v. Nelson* to hold that same-sex couples have no constitutional right to marry, per se. However, when it focused on the legal and economic burdens imposed by DOMA on same-sex couples, and the lack of practical justification for DOMA on the part of the federal government, the Court found that DOMA imposed an impermissible burden in violation of the Equal Protection Clause. Thus, the Court's treatment of the incidents of marriage was constitutionally different than its treatment of the status and reputational value of marriage.

The same approach is found in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) which became the companion case to *Windsor* under the name *Hollingsworth v. Perry*, 570 U.S. ___, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013). Although the appeal in *Perry* was dismissed on jurisdictional grounds and the decision was vacated, the Ninth Circuit's observations regarding the dual nature of marriage rights are still persuasive.

To give them context, California adopted a Domestic Partnership Act in 1999,[7] which was an "everything but marriage" law. Then in 2000, Californians passed an initiative, Proposition 22,[8] which specifically denied marital status to same-sex couples. In early 2008, Proposition 22 was struck down by the California Supreme Court. (*In re Marriage Cases*, 183 P.3d 384 (Cal. 2008)). However, that same year, the voters responded by passing Proposition 8, amending the California Constitution itself to prohibit same-sex marriage. In May 2009, Proposition 8 was challenged in Federal District Court on the basis of the Fourteenth Amendment to the U.S. Constitution. The District Court ruled that there was insufficient reason to justify denying same-sex couples the right to marry.

On appeal, a three-judge panel of the Ninth Circuit Court of Appeals affirmed the District Court.[9] However, it narrowly limited its decision to the unusual situation in California, where same-sex couples were first denied the right to marry (Proposition 22), then granted the right to marry (*In re Marriage Cases*, *supra*), then deprived of that right again (Proposition 8). Throughout those transitions, same-sex couples had all the practical rights of opposite-sex married couples. The only thing affected by the see-sawing

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[7] Cal. Fam. Code §297(a).

[8] Cal. Fam. Code §308.5.

[9] *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated on jurisdictional grounds*, *Hollingsworth v. Perry*, 570 U.S. ___, 133 S.Ct. 2652 (2013).

politics was their right to enjoy the reputational value of marriage, per se.

> "All that Proposition 8 accomplished was to take away from same-sex couples the right to be granted marriage licenses and thus legally to use the designation of 'marriage,' which symbolizes state legitimization and societal recognition of their committed relationships."

671 F.3d 1052, 1063.

In effect, the Court concluded that when the California Supreme Court struck down Proposition 22 in 2008 because there was no sufficient justification to deny same-sex couples the right to marry, the State essentially abandoned whatever argument it might otherwise have had to justify the enactment of Proposition 8. The Court emphasized that it was not deciding the question whether California, or any other state, could *ever* prohibit same-sex marriage, but rather only whether "Proposition 8's *elimination* of the rights of same-sex couples to marry . . . " was constitutional. *Id.*, at 1064. (Emphasis in original.) The Court's reasoning was entirely dependent on the unique character of the reputational value of marriage, distinct from the nature of its practical incidents – a bifurcated approach to the issue.

In *United States v. Windsor*, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), that same distinction was drawn from a slightly different perspective. There, the Supreme Court declared Section 3 of DOMA unconstitutional as an abuse of federal power under the Fifth

Amendment. But its reasoning was the same as in *Perry v. Brown*. Whereas in *Perry v. Brown* the same-sex marriage ban (Proposition 8) was revoked because California had previously decided that same-sex couples were entitled to marry, in *Windsor* the same-sex marriage ban (Section 3 of DOMA) was revoked because New York had previously decided that same-sex couples were entitled to marry.

More importantly, the *Windsor* decision was totally dependent on the fact that the State of New York had chosen, in a free and democratic process through its lawfully elected representatives, to dignify and ennoble same-sex relationships by permitting such couples to enter into state-sanctioned marriages. That was the public policy of the State of New York, and the Court's decision confirmed New York's exclusive right to exercise that power. Indeed, it was the very voluntariness of New York's decision to permit same-sex marriages that imparted those relationships with honor, dignity, and legitimization equal to that of opposite-sex married couples. The Court explained:

> "The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the *unquestioned authority of the States*.
>
> "The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their *sovereign power*, was

more than an incidental effect of the federal statute. It was its essence." *Id.*, at 2693. (Emphasis added.)

"The *State's power* in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here, the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. *When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community.* DOMA, because of its reach and extent, departs from this history and tradition of *reliance on state law to define marriage. . . .*" *Id.*, at 2692. (Emphasis added.)

"The congressional goal was 'to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws.' . . . That raises a most serious question under the Constitution's Fifth Amendment." *Id.*, at 2693.

These passages indicate that the Court considers the definition of marriage, or in other words the question of who is allowed to marry, to be a matter reserved to the States, and that it is the State's free exercise of that power that endows the institution of marriage with its unique reputational value. If the Constitution forces States to grant same-sex couples the status of marriage so that they can enjoy its

reputational value, then the presence of federal compulsion negates and emasculates the very societal recognition and honor that same-sex couples are trying to achieve.

III. States with "Everything but Marriage" Laws Do Not Violate the Fourteenth Amendment by Denying Same-Sex Couples the Reputational Value of Marriage.

A. The Fourteenth Amendment Requires a Heightened Level of Scrutiny for Laws Discriminating on the Basis of Sexual Orientation.

A law denying same-sex couples the reputational value of marriage discriminates against them on the basis of their sexual orientation. Whether such discrimination is prohibited by the Fourteenth Amendment depends on what level of scrutiny must be applied by the Court. On that question, we agree with the reasoning of the Ninth Circuit Court of Appeals in *SmithKline Beecham Corporation v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014).

In that case, the court considered whether it is constitutionally permissible to peremptorily strike potential jurors from a jury panel based solely upon their sexual orientation. Based on *Windsor*, the court held that it is not. In doing so, the court examined *Windsor* to determine what it says about the level of scrutiny required by the Fourteenth Amendment when considering discrimination based on sexual

orientation. The court concluded that *Windsor* requires a heightened level of scrutiny, demanding that the government establish that the discriminatory legislation was motivated by a legitimate state interest. The court stated:

> "*Windsor,* of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary. . . . When the Supreme Court has refrained from identifying its method of analysis, we have analyzed the Supreme Court precedent 'by considering what the Court actually did, rather than by dissecting isolated pieces of text.' (Citation omitted)" 740 F.3d 471, 480.

The court then proceeded to observe that the analysis in *Windsor* did not meet the usual standards of a rational basis review. It did not consider possible rationales for DOMA. It appeared to require a "legitimate state interest" to justify the harm caused by DOMA. And it relied upon several precedents, most of which required a heightened level of scrutiny. The court concluded:

> [W]e conclude that *Windsor* compels the same result with respect to equal protection that *Lawrence* compelled with respect to substantive due process: *Windsor* review is not rational basis review. In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than

> rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation. 740 F.3d 471, 481.

The Fourteenth Amendment therefore requires a heightened level of scrutiny in this case. Discrimination against same-sex couples in the enjoyment of the reputational value of marriage is a violation of the Fourteenth Amendment unless it promotes a legitimate state interest.

B. There is no Fundamental Right to Enjoy the Reputational Value of Marriage Separate from all its Legal and Economic Advantages.

Before proceeding, we should rebut the argument that the right to enjoy the reputational value of marriage is a fundamental right and therefore the strict scrutiny test should apply.

Cases that have found a fundamental right in marriage have generally focused on the legal and economic benefits that are appurtenant to marriage. Those benefits include such things as the right "to choose one's spouse, to decide whether to conceive or adopt a child, to publicly proclaim an enduring commitment to remain together through thick and thin. . . ." (*Kitchen v. Herbert*, 755 F.3d 1193, 1212-1213 (10th Cir. 2014), *cert. denied,* 135 S.Ct. 265, 190 L.Ed.2d 138 (2014); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)).

Collectively, those privileges may indeed constitute a fundamental right under the law. But as previously discussed, marriage per se is not a *sine qua non* for the benefits that marriage entails. The characteristics that give marriage its practical value and make it a fundamental right can all be conferred upon same-sex couples through civil union or domestic partnership statutes without granting them the reputational value of marriage, per se.

Therefore the issue is as follows: Is there a fundamental right to enjoy the reputational value of marriage on the part of same-sex couples who already enjoy legal and economic benefits identical to those of married couples in all other respects?

There is not. Not all privileges associated with the status of marriage enjoy the same constitutional protection. "By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to vigorous scrutiny." *Zablocki v. Redhail*, 434 U.S. 374, 386, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). "[I]t is fair to say that there is a right of marital and familial privacy which places some substantive limits on the regulatory power of government. But the court has yet to hold that all regulations touching upon marriage implicate a 'fundamental right' triggering the most exacting judicial scrutiny." Id., at 397 (Powell, J., concurring in the judgment).

The reputational value of marriage consists of having the State condone, honor, and dignify one's sexual conduct and lifestyle. For same-sex couples, it would mean having the State publicly acknowledge that homosexual behaviors and lifestyles are normal and consistent with conventional community standards. Is that a fundamental right?

The list of "fundamental rights" is very select. In *Griswald v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the Court stated: "The inquiry is whether a right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . .'" 85 S.Ct. at 1686-1687, quoting *Powell v. Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 77 L.Ed. 158 (1932). When considering whether an asserted right is a fundamental right, the court must consider whether the right is one of those fundamental rights and liberties which are, objectively, deeply rooted in the nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist without it. *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937).

Among the recognized fundamental rights are those rights which were considered "natural rights" by the founding fathers, including life, liberty, the pursuit of happiness, the freedoms of religion, assembly, and association, and the right to ownership of property. Also included are those rights which have as their source, and are guaranteed by, state or Federal

constitutions, such as freedom of speech, freedom of the press, and the right to bear arms. Finally, those rights are fundamental which are necessarily implied by the existence of other constitutional rights, such as the right of privacy.

The most obvious difference between those fundamental rights and the alleged right to have the state approve or dignify one's spousal choices or sexual preferences is that fundamental rights relate to the autonomy of persons to make their own choices without undue interference from the state. The state's response to the exercise of fundamental rights should be benign indifference. On the other hand, the alleged right asserted by same-sex couples is one that demands specific action on the part of the state – the adoption of a public policy placing the state's imprimatur of approval on the couple's relationship, conduct, or lifestyle.

The State's refusal to officially approve a specific personal lifestyle that it should otherwise treat with benign indifference (e.g., as required by *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003),) can hardly be characterized as violating the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Nor is a right to obtain such approval so "deeply rooted in the nation's history and tradition" that its refusal would threaten the existence of justice or liberty.

By analogy, the freedoms of speech, religion, and privacy do not include a fundamental right to insist

that the State officially and publicly approve whatever one chooses to say, believe, or do in the privacy of one's home. Similarly, the right to select a mate, to make long-term and lasting commitments of mutual love and support, to form a household and establish a family, and to bear and raise children, does not include the right to insist that the state overtly approve one's choices in that regard. No citizen has the right to preempt the state's free exercise of its police power by insisting on personal endorsements of their individual behaviors and lifestyle choices.

Consequently, the reputational value of marriage does not meet the test of a fundamental right. States with "everything but marriage" laws may therefore refuse to let same sex couples marry if that policy is supported by a legitimate state interest.

C. Promoting the Public Welfare by Defending the Values of Traditional Marriage and Sexual Morality is a Legitimate State Interest.

Until the last half-century or so, our societal norms held that sexual relations outside the bounds of a marriage, including homosexual relations, were immoral and indecent and therefore within the police power of the States to prohibit in the interest of public welfare. As stated by Justice Harlan in his dissent in *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961):

> "[T]he very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. . . . The laws . . . forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any constitutional doctrine in this area must build upon that basis."

367 U.S. 497, 545-546.

See also, *Griswald v. Connecticutt*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), Goldberg, J., concurring, 381 U.S. 479, 498-499; *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878), quoted in *Zablocki v. Redhail*, 434 U.S. 374, 399, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978).

Society's interest in sexual morality is more than a sectarian obsession. Sexual mores are practical and utilitarian, and valuable to society in many ways. For evidence of that, it suffices to point to the societal goal of reducing the incidence of out-of-wedlock births. It is reasonable to believe that children born out-of-wedlock are much less likely to enjoy the same benefits that are provided by a family where a mother and father fulfill their traditional roles. Further, the statistical frequency of children born out-of-wedlock is directly related to the prevalence of extramarital sexual relations. That phenomenon, in turn, is directly related to

how seriously a society treats sexual morality as a cultural expectation.

The promotion of sexual morality as a social norm and a proper object of government action has been manifest in other areas of the law. For example, the jurisprudence surrounding obscenity and pornography instructs us that the State may regulate sexual expression or depictions of sexual conduct according to community standards for the purpose of promoting good morals, particularly where the sexual expression or conduct is in public view or where undesirable expressions or conduct are represented as being officially sanctioned. "[A]ny benefit that may be derived from [lewd and obscene utterances] is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). In *Roth v. U.S.* (*Alberts v. California*), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), Justice Harlan, in his concurring opinion in *Alberts*, stated:

> "[I]t is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society. In fact, the very division of opinion on the subject counsels us to respect the choice made by the State. . . .
>
> "The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade

> sex, will have an eroding effect on moral standards."

354 U.S. 476, 501-502.

See also, *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), where the Court held that "there are legitimate state interests at stake in stemming the tide of commercialized obscenity. . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." The court reasoned that even though "there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society" and "no conclusive proof of a connection between antisocial behavior and obscene material," the legislature of Georgia "could quite reasonably determine that such a connection does or might exist" and "could legitimately act on such a conclusion to protect 'the social interest in order and morality.'" 413 U.S. 49, 57-63, quoting *Roth v. U.S.*, 354 U.S. at 485, and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

The interest of the State in refusing to publicly condone conduct that is detrimental to public welfare can be even greater than the State's interest in regulating the conduct itself.

> "[Psychiatrists] made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the

> reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is true of parental approval, it is equally so of societal approval – another potent influence on the developing ego." Gaylin, *Book Review*, 77 Yale L.J. 579, 592-594 (1968).

How the Constitution treats pornography is particularly helpful to this argument, since the principles applied there apply all the more strongly in the case of actual physical conduct. "[T]he States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." *Miller v. California*, 413 U.S. 15, 26 (fn.8), 93 S.Ct. 2607, 37 L.Ed.2d 419 (1965).

On the other hand, the State's interest in promoting sexual morality obviously conflicts with the growing recognition of a constitutional right of privacy. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Griswald, supra*; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Carey v. Population Services Int'l*, 431 U.S. 678, 97

S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).

In course of time, two cases illuminated the expanding freedom of same-sex couples: *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) and *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). However, neither of those decisions questioned whether the promotion of sexual morality is a legitimate government interest.

In *Lawrence*, the Court overturned a Texas statute that made certain sexual conduct between two persons of the same sex a crime. However, the Court recognized that although States cannot classify private, consensual, homosexual acts as crimes, same-sex relationships may still not be entitled to formal legal recognition.

> "[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. . . . These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."

Id., at 571.

Most importantly, the Court was careful to disclaim any intention that its decision would cast doubt upon the power of the States to protect the traditional

institution of marriage. In the majority opinion, Justice Kennedy distinguished this decision from other circumstances:

> "The present case does not involve minors. . . . It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.*, at 578.

Justice Sandra Day O'Connor, in her concurring opinion, also emphasized that point:

> "That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations – the asserted state interest in this case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Id.*, at 585.

Cases decided over the last 130 years have consistently affirmed that the promotion of sexual morality is a legitimate state interest, and that there is a secular morality that is central to the fabric of our society totally apart from religious notions. As observed by Prof. Laurence Tribe: "It has been proposed that restrictions on the woman's decision to terminate

a pregnancy are unconstitutional when they reflect merely a moral, as opposed to an instrumental or utilitarian, justification. But all normative judgments are rooted in moral premises. . . ." Tribe, *American Constitutional Law,* 928-929 (1978). "For what is the Constitution itself, if not a collection of '[enduring] value judgments of the majority,' interpreted and applied by the courts so as to be 'the vehicle for protecting minorities from the [momentary] value judgments of the majority'? The entire body of the Constitution, amendments and all, is a series of judgments by an extraordinary majority that limit the power of future political majorities." Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L.Rev. 981, at 1042-1043.

In other words, morality is concerned with judging between right and wrong. The state is rightfully concerned about the practical impacts of moral choices on society, particularly in regard to sexual conduct. Good behaviors, choices, and lifestyles in regard to sexual conduct can lead to the improvement of humanity, and to the betterment of all people.

Same-sex couples claim that the state cannot rely upon moral values to deny them the right to marry. But their own argument contradicts their claim. They contend that same-sex marriage bans are nothing but a value judgment about homosexuality. But the very reason why they demand the right to marry is because they want that value judgment made, and they want it made in their favor. Marriage implies moral approval by society, and that is what they pursue – moral approval, acceptance, normalization,

and legitimization of their lifestyle and conduct. The stigma they suffer if they are denied the right to marry is the stigma of not having their relationship viewed as morally acceptable.

"Approval" requires the exercise of judgment and discretion. And judgments are based upon considerations of right and wrong, good and bad, which by definition are moral comparisons. Official state approval of familial or sexual relationships can only be based upon moral values of some kind.

Consequently, to win their argument, same-sex couples have to embrace one or the other of two positions. One position would be to admit that the State does have the power to consider secular moral values in defining marriage, in which case secular moral values exist and are a legitimate state interest. Based on that premise, the issue becomes whether the harm that would be inflicted on society by the State's official approval and condoning of homosexuality is somehow outweighed by the harm that same-sex couples would suffer if such approval were withheld. That judgment is the State's to make. (See *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1965).)

Or, their only other viable argument would be that the traditional institution of marriage has nothing to do with morality, moral approval, or moral values. If that is the case, then there is no moral advantage or reputational value to be gained by being married. In states with "everything but marriage" laws, same-sex marriage bans would be supported by

no legitimate state interest, but would also deny same-sex couples nothing of value.

If by some reasoning that latter result prevails, then we will have come to the conclusion that traditional marriage means nothing morally, in spite of hundreds, if not thousands of years of tradition; and the traditional institution of marriage as we know it, as an honored moral status, will be dead.

Therefore, to summarize the impact of all the jurisprudence leading up through *Lawrence*, Amicus submits that although same-sex couples cannot be criminally punished for homosexual acts, defending the values of traditional marriage and sexual morality is still a legitimate state interest. A State may still deny same-sex couples the right to enter into the status of marriage if that policy promotes the State's values of traditional marriage and sexual morality.

D. Limiting Marriage to Opposite-Sex Couples Promotes the Values of Traditional Marriage and Sexual Morality.

The narrow question addressed by Amicus is whether a State that already has an "everything but marriage" law is required by the Constitution to condone homosexuality by giving same-sex couples license to marry. That makes the central issue not whether a private act between two citizens can be prohibited, as in *Lawrence*, but rather whether a public act of the State can be compelled.

The practical societal implications of giving same-sex marriages the official sanction of public policy are vastly more significant than the societal impact of one couple's consensual sexual conduct in the privacy of their bedroom. Amicus submits that a State's official approval of same-sex marriages would substantially undermine its legitimate interest in promoting the benefits of traditional marriage and sexual morality.

Those benefits are apparent from our cultural experience. From experience, it is reasonable to believe that the institution of traditional heterosexual marriage is critical to society. Through heterosexual marriage, society regenerates itself by the procreation of children in an environment where children of both sexes have gender-appropriate role models to prepare them for life. Extramarital sex is reasonably considered irresponsible and inappropriate and is almost universally discouraged by ordered societies because it is reasonably understood to increase the likelihood of children being born without the benefit of such a long-term nurturing environment.

Traditional marriage is well-understood as a symbol of society's approval and acceptance of a couple's sexual relations. Within marriage, couples enjoy intimate sexual relations without the stigma, disapproval, and often punishment that would otherwise accompany immoral, illicit sexual relations. The ideal of marriage therefore promotes the virtues of self-control, discipline, responsibility, and accountability among couples who are preparing to assume the

obligations of marriage and parenthood, thereby reducing the incidence of unwanted unwed motherhood.

Homosexual relationships, on the other hand, can reasonably be viewed as a potential impediment to the purposes sought to be achieved by the traditional institution of marriage. Homosexual relationships can reasonably be perceived as violating the cultural convention against sexual relations outside of a traditional marriage. They can reasonably be perceived as being less likely to result in the procreation of children by the persons involved. Even when same-sex couples do have children, their relationship can reasonably be perceived as being less likely to provide children of both sexes with gender-appropriate role models.

Furthermore, a State could reasonably conclude that public approval and acceptance of homosexual relationships, in spite of those drawbacks, will contribute to an atmosphere or culture of general sexual freedom and promiscuity, including heterosexual relationships, thereby increasing the prevalence of unwanted out-of-wedlock births.

It could well be argued that private consensual sexual conduct should be of no concern whatsoever to the government. But when we take the sexual customs of entire populations of people in our society, their combined impact is noticeable and measurable. In that way, sexual morality itself has practical social value totally aside from its religious significance.

The act of the state in denying same-sex couples the reputational value of marriage cannot be viewed in isolation of the state's overall approach to same-sex marriage. In a state that adopts an "everything but marriage" law, that overall approach includes giving same-sex couples "everything else" that would encourage and support the creation of long-term, committed, loving family relationships. That approach seeks to protect the good morals of society while still treating same-sex couples equally for all other practical purposes, where any negative impact of same-sex relationships on social norms may be less predictable.

For those reasons, a State can reasonably conclude that it should place a higher value on traditional marriage and sexual morality than on other forms of committed relationships. Forcing a State to officially condone same-sex relationships in a highly prominent and conspicuous way, i.e., by issuing marriage licenses to same-sex couples – placing the State's imprimatur of approval on the couple's relationship – would work in direct opposition to that policy.

Amicus recognizes the inevitable comparisons between this argument and the argument of the segregationists in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.2d 873 (1954). In states that adopt, or have adopted, "everything but marriage" laws, this argument looks very much like "separate but equal." But there are compelling distinctions between this case and *Brown*.

In *Brown* the issue was, all other things being equal, does the Fourteenth Amendment allow the States to provide two separate education systems for the two separate races? 347 U.S. 483, 492. In ruling that it does not, the Court emphasized the intangible differences between the two races' experiences in school, as opposed to the tangible similarities. The Court found that separating school children based solely on their race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . The impact is greater when it has the sanction of the law. . . ." *Id.*, at 494. "Separate educational facilities are inherently unequal." *Id.*, at 495.

This case is distinguishable from *Brown*, for three reasons. First, in *Brown*, there was no legitimate state interest advanced in favor of the segregation of schools, as there is here. Second, as in the case of *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), race played the crucial role in *Brown*, demonstrating that the discriminatory law was simply invidious under the doctrine of strict scrutiny. That is not the case here. Third, there was no contention in *Brown* that the stigma of inferiority suffered by black children forced to attend segregated schools was the result of anything but their segregation. That is not the case here.

Specifically, in *Brown*, the Court had the benefit of a century of black experience in segregated schools. The causal connection between segregation and a

feeling of inferiority among black children was undeniable.

In this case, however, the experience of same-sex families is less well documented. A child of a same-sex couple may be stigmatized more by the unusual appearance of having "two fathers" or "two mothers" than by whatever their legal status happens to be. As for the parents themselves, the disadvantage of being denied the reputational value of marriage is not sufficient to override the State's power to control what lifestyles and behaviors it does or does not condone, as is thoroughly discussed above.

IV. States with "Everything but Marriage" Laws Do Not Violate the Fourteenth Amendment by Refusing to Recognize the Marital Status of Same-Sex Couples Married in Other States.

Although the legal principles that apply under the Full Faith and Credit Clause[10] are different than under the Fourteenth Amendment, the outcome should be the same. In states that have "everything but marriage" laws, the Fourteenth Amendment does not require the State to recognize the married status of couples married in other states if it does not permit same-sex marriages within in its own borders.

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[10] U.S. Constitution, art. IV, section 1.

In *Windsor*, it was found that because of the primacy of State law regarding the definition of marriage, the Federal government could not refuse to recognize the marital status of New York-married same-sex couples. However, when the issue becomes whether a State must recognize the married status of same-sex couples married in other States, there is no rank or precedence between the policies of one State and the policies of the other. *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1929). If New York has a strong public policy in favor of same-sex marriage, then why would Idaho's strong public policy against same-sex marriage (assuming Idaho had an "everything but marriage" civil union statute) be entitled to any less respect, constitutionally? There is no constitutionally valid reason why the decision of New York to allow same-sex marriages would be of any greater constitutional strength than the decision of Idaho not to allow or recognize them, as long as the New York-married couple was not deprived of any other legal or economic rights, privileges or benefits that married couples in Idaho enjoy.

CONCLUSION

Each State should have the opportunity to evaluate whether, in its own communities, the growing spirit of tolerance and equality justifies an evolution in their societal views of morality. The Constitution should not deprive the States (at least those that have adopted or will adopt "everything but marriage"

laws) of the power to decide whether or not to embrace same-sex relationships by clothing them with the garments of marriage and all the symbolic significance that entails.

The decision of the Sixth Circuit Court of Appeals should be affirmed. At the worst, the Court should declare that if a state allows a same-sex couple to enter into a legal union that entitles them to the identically same legal and economic rights, privileges, and benefits that married couples enjoy, then the Fourteenth Amendment does *not* require that state to issue them a marriage license.

Respectfully submitted,

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